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No. 782

In the Supreme Court of the United States

OCTOBER TERM, 1959

MARY HELEN BURTON, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9)[1] is reported at 272 F. 2d 473.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1959 (Pet. App. 10). A petition for rehearing was denied on January 7, 1960 (Pet. App. 11). On February 4, 1960, Mr. Chief Justice Warren extended the time for filing a petition for a writ of

[1] "R." refers to the reporter's transcript. "S.T." refers to the Supplement containing the formal documents in the district court. "Y.Tr." refers to the hearing on the first motion to suppress.

certiorari to and including March 6, 1960. The petition for a writ of certiorari was filed on March 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether narcotics which petitioner surreptitiously dropped to the ground in an open driveway, upon being accosted there by local officers, were properly admitted at her trial.

STATEMENT

At a trial without a jury, petitioner was convicted in the United States District Court for the Southern District of California of receipt and concealment of illegally imported narcotics in violation of 21 U.S.C. 174. She was sentenced as a second offender to imprisonment for the minimum term of ten years.

The issues raised in the petition concern only the admissibility of narcotics taken from the ground near petitioner's person at the time of her arrest in an open driveway. There had also been a search of petitioner's apartment, but the evidence uncovered there was not involved in the count on which petitioner was convicted. Petitioner made three motions to suppress before trial.[2] The motions were made on the basis of an affidavit of her attorney and in none did she assert any interest in the property taken from the driveway (S.T. 7-9, 31-33). The motions were denied. At the trial, petitioner again renewed the motion to suppress, which was again denied. The pertinent evidence with respect to the issues raised may be summarized as follows:

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[2] Petitioner was actually tried on a superseding indictment.

1. On May 2, 1957, two Los Angeles County deputy sheriffs were investigating a report from an undisclosed source as to the alleged sale of narcotics in the vicinity where petitioner was subsequently arrested. About 10:00 p.m., a car was driven into the driveway at 733 East 55th Street, and parked (R. 66, 163-164, 166, 215-217). Petitioner and co-defendant Stewart got out of the car and went back to a garage apartment at the rear of the premises, where they remained for about twenty minutes (R. 167-168). As they were returning to their parked car, one of the officers called to them, "Police officers. Stop." He had his gun drawn at the time and turned his flashlight on the pair. His intention at the time was to make an arrest (R. 173, 175, 224, 233). Stewart lunged to one side, but was brought under control by one of the officers. Almost simultaneously, an object was seen to drop from underneath petitioner's three-quarter length coat and to fall on the ground in front of her (R. 175-176, 226-227, 295-296, 306, 361). Petitioner was ordered to place her hands on the hood of the parked car. The object which had fallen was retrieved and was found to be a small manila envelope containing a substance which proved to be 88 grains of heroin hydrochloride and adulterants (R. 175, 177, 142, 144). At the hearing on the first motion to suppress, the transcript of which was stipulated as in evidence under the present indictment (R. 72), petitioner testified that the officers found something on the ground under the car and denied it was hers (Y. Tr. 22, 25).

A search was then made of the garage apartment, which uncovered additional narcotics and parapher-

nalia (R. 178-190).[3] A call was made to Sergeant Landry of the sheriff's office and, about an hour and a half after the arrest, Landry arrived, accompanied by federal Treasury Agent Richards (R. 194). The items of evidence were gathered up, a search was made of the parked car, following which petitioner and Stewart were taken to the federal building and interrogated (R. 195-196). They were jailed on both federal and state narcotics charges (R. 351-352).

2. The federal and state officers had been working together on narcotics cases for about 4½ years (R. 57, 95-96, 198) and a majority of the cases were turned over to the federal government (R. 104). The federal agent testified that, where state officers made purchases with federal funds, the prosecution was in federal courts, but that the federal government did not join in all cases (R. 114). There was no arrangement between state and federal officers as to this particular investigation (R. 90-93, 98, 102, 111). The federal agent Richards was with state officer Landry on another matter when Landry received a call about petitioner's arrest (R. 110). The federal agent knew nothing about the case until he arrived on the scene after the arrest (R. 111, 112-113).

ARGUMENT

In affirming the judgment of conviction, the court of appeals ruled that petitioner could not object to the admissibility of the narcotics taken from the ground at the time of her arrest, for two reasons: (1) that the evidence was not obtained by a search of her person

[3] This was the basis for count 2 of the indictment, as to which both defendants were acquitted.

and there was no illegal seizure in picking up an article which had been abandoned; and (2) that petitioner, who disclaimed any interest in the property taken, had no standing to move to suppress. While the court of appeals did note that petitioner had not shown that the arresting officers acted without probable cause, we do not read the opinion below, as petitioner does, as upholding the admissibility of the evidence on the basis of the legality of the arrest. The court of appeals stated (Pet. App. 5-6):

> Here there was admittedly no warrant for arrest. But lack of "probable cause" or "reasonable grounds" for the arrest was not developed by appellant, if it existed at all. The government argues that lack of probable cause for arrest or search is unimportant and immaterial because appellant is in no position to claim an interest in the evidence abandoned by her, and we agree.

Thus, contrary to petitioner's contention, the decision is not based on petitioner's failure to prove that the officers lacked probable cause.

Of the grounds relied upon by the court of appeals, the second—that one who claims no interest in the narcotics taken (there being in this case no search or seizure from a house or other premises) has no standing to move to suppress—has been determined in *Jones* v. *United States,* No. 69, this Term, decided March 28, 1960. The decision in that case undermines the validity of this basis of the decision below.

But assuming that petitioner had standing in this respect, the decision below would still be correct for the alternative basis—that there was "in fact and law no search and in law no seizure of the evidence by

which appellant was convicted" (Pet. App. 6-7)—is supported by the applicable precedents. This evidence did not come into the possession of the officers as the result of a search or an unlawful entry into a dwelling. Whether the arrest was legal or illegal, the officers had the right to pick up an envelope that was lying on the ground in their plain view. *Hester* v. *United States*, 265 U.S. 57, is a direct parallel. There, prohibition agents, "[i]n consequences of information" (265 U.S. at 58),[4] went to the vicinity of Hester's home and concealed themselves. They saw Hester come out of the house and hand one Henderson a bottle. About that time, Henderson's mother, who was sitting in a car on the main road, gave an alarm (No. 243, O.T. 1923, R. 16). Hester thereupon took a gallon jug from an automobile standing nearby and both men ran away. "One of the officers pursued, and fired a pistol" (265 U.S. at 58). Hester dropped the jug and Henderson threw away the bottle. The jug and bottle, as well as a jar which had been thrown from the house, were retrieved by the officers and all three were found to contain moonshine whiskey. The officers had no warrant for search or arrest. This Court, by Mr. Justice Holmes, held the evidence admissible, finding it unnecessary to decide whether the action of the officers which caused Hester to betray himself was legal (265 U.S. at 58):

> * * * It is obvious that even if there had been a trespass, the above testimony was not obtained by

[4] The testimony of one of the agent's was simply that "[a]s a result of information" they drove to the vicinity of Hester's house (No. 243, O.T. 1923, R. 21). Testimony by another agent that they had destroyed distilleries near the house and "had information" that Hester kept whiskey there had been stricken by the court on the ground that "[h]e can't state what his information was" (*id.*, p. 15).

> an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned.
> * * *

Neither *Williams* v. *United States*, 237 F. 2d 789 (C.A. D.C.), nor *Work* v. *United States*, 243 F. 2d 660 (C.A. D.C.), are in conflict with the decision below on this aspect of the case. As the court below pointed out (Pet. App. 5), in *Williams* the narcotics were not abandoned until after the defendant had been arrested and was about to be searched at headquarters; the court seems to have treated the disposal of the narcotics at that time and place as the equivalent of a search of the person. In *Work* v. *United States*, the District of Columbia Circuit specifically ruled that narcotics placed in trash cans in close proximity to the house had *not* been abandoned, but were within the curtilage protected by the Fourth Amendment. 243 F. 2d at p. 662. In neither case did the court of appeals purport to overrule—indeed, in *Work* it specifically distinguished—its prior decision in *Lee* v. *United States*, 221 F. 2d 29, where it had upheld the seizure of jewelry in a napkin dropped between an automobile and the curb when defendants were asked by police officers to step out of the car. In short, there is no conflict as to the principle that, even though action by police officers may have been the motivation for the defendants' abandoning the challenged property, objects abandoned in an area not protected by the Fourth Amendment—such as the open driveway in this case (see *Hester* v. *United*

States, supra)—may be taken without involving any infringement of constitutional rights.[5]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] The case is thus different from *Rios* v. *United States*, No. 52, argued March 29, 1960, which involves a seizure of narcotics which the defendant dropped *in a taxicab* when officers approached it as it was stopped for a traffic light.

The court of appeals below found it unnecessary to consider whether the evidence would have been admissible under the "silver-platter" doctrine, *i.e.*, that evidence illegally obtained by state officers is admissible in a federal court if federal officers did not participate in the seizure. [redacted] doctrine is presently under consideration by this Court in *Rios* v. *United States*, *supra*, and *Elkins* v. *United States*, No. 126, argued March 28-29, 1960. The question would be involved here only if petitioner were found to have standing despite her abandonment of the property. If it should be necessary to reach the question, the government's position would be that the general cooperation between state and federal officers in other narcotics cases does not serve to transform the action of state officers into federal action in this case where the state officers acted on their own.

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